

EDOs of Australia



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Submission regarding the *Water Amendment (Review Implementation and Other Measures) Bill 2015*

25 February 2016

EDOs of Australia (Australian Network of Environmental Defenders Offices Inc.) consists of eight independently constituted and managed community legal centres located across the States and Territories.

Each EDO is dedicated to protecting the environment in the public interest. EDOs:

- provide legal representation and advice,
- take an active role in environmental law reform and policy formulation, and
- offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

EDOs of Australia (**EDOA**) welcomes the opportunity to assist the Senate Standing Committees on Rural and Regional Affairs and Transport (**Committee**) with its inquiry into the *Water Amendment (Review Implementation and Other Measures) Bill 2015 (Water Amendment Bill)*.

We are a network of independent not-for-profit community legal centres that specialise in public interest environmental law. We have 30 years' experience advising Australian communities on using the law to protect the environment. This includes advice, casework, education and law reform. These services are fundamental to providing access to justice across the spectrum of federal and state environmental and planning laws.

EDO offices are located in the Basin states of Queensland, New South Wales, the ACT and South Australia. These offices service clients who live across the Basin, including farmers and community groups.

We have extensive experience advising on the *Water Act 2007 (Water Act)* and Basin Plan. Our law reform and policy work includes submissions responding to the Draft Basin Plan, strategies made pursuant to the Basin Plan, and various amendments to the Water Act.¹

EDOA supports implementation of the Basin Plan on time and in full, subject to any necessary adjustments to SDLs based on existing knowledge about future climate change. Indeed, evidence suggests that the next few years are crucial if the Plan's adaptive management framework is to be used to 'enact robust climate change adaptation measures to manage increased temperatures, changes in water availability and more frequent extreme events, among other impacts.'² This will necessitate some amendments to the both the Water Act and Plan itself. These and other recommendations are outlined in the body of this submission.

Our submission addresses the following matters:

1. Commonwealth Environmental Water Holder (**CEWH**): expanding functions to include 'environmental activities' and reporting requirements
2. Review requirements for the Basin Plan
3. Statutory review of the Water Act
4. Accreditation of water resource plans
5. Indigenous matters

¹ EDOA has prepared submissions in respect of the Proposed Basin Plan; the Murray-Darling Basin Ministerial Council s.43A Notice; the *Water Amendment (Long Term Sustainable Diversion Limit Adjustment) Bill 2012*; and the *Water Amendment (Water for the Environment Special Account) Bill 2012*, amongst others. Available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3

² Grafton, Williams, Pittock, *The Murray-Darling Basin Plan Fails to Deal Adequately with Climate Change*, *Water*, January 2015, p. 26.

**1. CEWH: expanding functions to include ‘environmental activities’;
operational charges; reporting requirements**

Environmental activities

The Bill proposes to expand the CEWH’s functions to include undefined ‘environmental activities’³ where certain conditions are met. We wish to make the following comments in relation to this proposal.

First, we note that it is highly unusual not to define terminology such as ‘environmental activities’ in legislation. We understand that this was deliberate choice intended to provide the CEWH with sufficient flexibility to undertake a range of activities that may augment the environmental outcomes that they can achieve with their water.

While we can see the value of this approach, we are nonetheless concerned that the relevant provisions do not include sufficient checks and balances. This may in turn result in the CEWH being required to undertake activities that are the province of other agencies.

The current wording of the Bill provides that CEWH may only dispose of allocations for the purposes of undertaking such activities if he or she ‘reasonably believes, at the time of the disposal, that using the proceeds for [these] activities’ would improve the capacity of the CEWH’s water holdings to be applied to meet the objectives of the environmental watering plan (**EWP**) (or an area outside the Basin, if provided for in any regulations).⁴

We note that the test ‘reasonably believes’ is not a subjective one.⁵ At the time the CEWH decides to sell the allocations, there must be some factual basis to their belief that the proceeds of the sale can be used – at some point in the future - for environmental activities that will improve the capacity of their water to meet the objectives of the EWP or any relevant area outside the Basin.

However, the Bill does not include a requirement that the CEWH ‘reasonably believes’ that the *activities themselves* will improve the capacity of their water to meet the objectives of the EWP. This is a subtle but potentially important distinction. Specifically, it means that CEWH can ultimately undertake environmental activities that do not improve the capacity of their water to meet the objectives of the EWP (or an area outside the Basin) without breaching the proposed provisions.

EDOA does not support such broadly drafted legislation. While the Act imposes a high order requirement on the CEWH to carry out its functions ‘so as to give effect to the relevant international agreements’,⁶ the wording nonetheless opens up the possibility of inappropriate cost shifting. Moreover, it removes the strict nexus between the activities of the CEWH and the objectives of the EWP, which is one of the key elements of the Basin Plan.

³ Propsoed s. 106(3).

⁴ Proposed s. 106(3)(c).

⁵ See *Mckinnon v Secretary, Department of Treasury* (2006) 229 ALR 187.

⁶ Water Act, s. 105(3).

Operational charges

The Bill clarifies that ‘environmental activities’ do not include regulated water charges.⁷ That is, the CEWH does not have to use its funds to pay for these charges. EDOA **strongly supports** this provision.

Reporting requirements

EDOA is broadly supportive of the proposal to expand the CEWH’s annual reporting requirements to include information regarding:

- the water disposed of during the year;
- the amount of the proceeds of the disposal; and
- the purposes for which the proceeds of disposals have been used during the year.⁸

However, it would be useful for the community to understand how any environmental activities undertaken by the CEWH have improved their capacity to use their water to meet the objectives of the EWP (or to achieve outcomes outside the Basin, as stipulated in any relevant regulation).

Recommendations

EDOA strongly recommends:

- amending the Bill to include a provision which requires the CEWH to ‘reasonably believe’ that undertaking a particular environmental activity will improve their capacity to meet the objectives of the EWP (or an area outside the Basin, as stipulated in any relevant regulations).
- amending the Bill to require the CEWH to outline in their annual report how any environmental activities undertaken during the year have improved their capacity to meet the objectives of the EWP (or to achieve outcomes outside the Basin, as stipulated in any relevant regulation).

2. Review of the Basin Plan

The Water Act currently requires the Murray-Darling Basin Authority (**MDBA**) to conduct a review 10 years after the Basin Plan takes effect (so in the year following November 2022).⁹ The Bill requires the MDBA to review the Basin Plan in 2026 and provide the Minister with a report of that review.¹⁰ The review date has therefore been postponed by 4 years.

The Government has indicated that this is to provide time to assess the impact of the adjustment mechanism (the reconciliation date is 2024). EDOA understands the logic of this amendment, however is concerned that will result in approximately 14 years passing before the Basin Plan is reviewed. This is particularly problematic in light of the fact that the sustainable diversion limits (**SDLs**) in the Plan do not take into account future climate change. This may prove to be catastrophic when the next significant drought hits South

⁷ Proposed s. 106 (4).

⁸ Proposed s. 114(2)(aa), (ab).

⁹ Water Act, s. 50(1).

¹⁰ Proposed s. 50(1)(a).

Eastern Australia. As noted by three of Australia's most eminent water scientists, Professor R. Quentin Grafton, Professor John Williams and Associate Professor Jamie Pittock:

It is our view that the failure to use current knowledge on projected impacts of climate change in the computation for the Basin Plan's sustainable diversion limits, or provision for systematic adjustment into the future, significantly increases the risks to the ecological health of the river systems. It also increases the uncertainty to communities, who now have no clear policy setting or process to manage the anticipated changes in water availability into the future. We conclude that action is required to revise the Basin Plan (and the Water for the Future package) earlier than is scheduled for 2022.¹¹

We therefore believe that the SDLs in the Basin Plan should be reviewed before 2022 for the express purpose of determining if they are consistent with current knowledge on projected impacts of climate change.

The Water Act currently requires 5 yearly reviews of (a) water quality and salinity targets in the water quality and salinity management plans and (b) the environmental watering plan. The next review is to be undertaken in 2017.¹² We therefore propose that a 'climate change review' of the SDLs also be undertaken in 2017.

In making this recommendation, we note that the Bill adds a 'social and economic impacts of the Basin Plan' to the list of matters that must be reviewed every 5 years.¹³ Given the likely impacts of climate change on rural communities in the Basin, socio-economic analysis cannot be divorced from a proper assessment of future climate trends.

Recommendation

- EDOA strongly recommends that the Water Act be amended so that SDLs are reviewed in 2017 to determine if they are consistent with current knowledge on the projected impacts of climate change.

3. Statutory review of the Water Act

The Water Act must be reviewed every 10 years.¹⁴ The current terms of reference for that review are quite detailed and include assessment of whether the SDLs are being met.¹⁵

The Bill removes the mandatory terms of reference for the statutory review. The amended version simply states that the Minister must 'cause to be conducted a review of...the operation of the Act.' It then states that the 'terms of reference are to be determined by the Minister in consultation with the States.'¹⁶

¹¹ Grafton, Williams, Pittock, The Murray-Darling Basin Plan Fails to Deal Adequately with Climate Change, *Water*, January 2015, p. 26.

¹² Water Act, s. 22 (1), item 13.

¹³ Proposed s. 50(22)(1), item 13(c). The first socio-economic review is to be undertaken in 2020.

¹⁴ Water Act, s. 253(1).

¹⁵ Water Act, s. 253(2).

¹⁶ Proposed s. 253(2)(2).

EDOA believes that at the very least the terms of reference should include an assessment of whether the SDLs are being met, and whether the SDLs should be revised in light of the latest evidence regarding the projected impacts of climate change.

As the Act derives the majority of its constitutional validity from a suite of environmental treaties, the review should also assess whether these treaties are being properly implemented in the MDB under the Act.

It is also appropriate for the Act to be reviewed by an individual with particular expertise in water policy and an understanding of environmental issues across the Basin.

In making these recommendations, we note that the Water Act was introduced in 2007 as a *specific response* to the ongoing, serious challenges faced by the Basin. These included poor cross-jurisdictional management, overallocation of water resources and declining ecosystem health (which by 2007 had left 20 out of 23 river systems in poor or very poor health).¹⁷

It is therefore pertinent for the statutory review to determine whether these challenges are being met by the Act, and whether Australia is meeting its international obligations in the MDB.

Recommendation

- EDOA strongly recommends that the Act be amended to require the terms of reference for the statutory review of the Act to include:
 - an assessment of whether the SDLs are being met;
 - an assessment of whether the SDLs should be revised in light of the latest evidence regarding climate change;
 - an assessment as to whether Australia is meeting its international obligations under the ‘relevant environmental treaties’ specified in the Water Act;
 - other relevant matters regarding the operation of the Act.
 - We further recommend that the Act be amended to require that the review be conducted by an independent and suitably qualified person. This person must have expertise in water policy and an understanding of the environmental issues faced by the Basin.

4. Accreditation of water resource plans

We note that the Report of the Independent Review of the Water Act 2007 (**Independent Review**) recommended streamlining the accreditation process.¹⁸ Contrary to this recommendation, the amendments proposed in the Bill introduce a high degree of flexibility regarding accreditation of water resource plans. This flexibility will enable Basin States to choose which version of the Basin Plan is relevant for accreditation purposes (assuming certain conditions are met).¹⁹

¹⁷ Davies PE, JH Harris, TJ Hillman and KF Walker 2008. *SRA Report 1: A Report on the Ecological Health of Rivers in the Murray–Darling Basin, 2004–2007*. Prepared by the Independent Sustainable Rivers Audit Group for the Murray–Darling Basin Ministerial Council, p. xi.

¹⁸ Commonwealth of Australia, *Report of the Independent Review of the Water Act 2007*, November 2014, p. 48.

¹⁹ Proposed s. 56(2).

This is no doubt intended to account for the adjustments to the SDLs that will likely occur in 2016 and 2024 (which will in turn result in amendments to the Basin Plan). This will allow Basin States to choose the version of the Basin Plan with the highest SDLs (that is, the version that allows the highest consumptive use in the relevant water resource or resources).

EDO is not opposed to the adaptive management approach that underpins the Basin Plan. However, the proposed amendments will not facilitate an adaptive approach for the purposes of mitigating the impacts of climate change. Rather and as noted above, they will allow Basin States to choose the version of the Basin Plan with the highest SDLs.

Furthermore, the proposed amendments are highly complex and to that extent inaccessible to the vast majority of people and groups with an interest in the management of Basin water resources. This is in itself problematic as it all but eliminates the possibility of meaningful engagement across the Basin.

While EDO NSW has produced a briefing note explaining these provisions,²⁰ it would nonetheless be useful if the Government clarified their purpose.

Recommendations

EDO strongly recommends:

- that the Committee Report clarify the purpose of the proposed amendments to the accreditation process, particularly in relation to the adjustments that are likely to occur in 2016 and 2024 (Southern Basin) and 2017 (Northern Basin).
- that the Act be amended to *require* the accreditation of water resource plans to be linked to any 'emergency' adjustments to SDLs based on climate change (rather than providing flexibility regarding which version of the Plan is chosen for the purposes of accreditation). Emergency adjustments could arise out of the proposed 'climate change review' recommended under Section 2 of this submission.

5. Indigenous matters

The Water Act does not adequately acknowledge indigenous knowledge or provide for cultural water. The Bill partly addresses this significant oversight by:

- requiring water resource plans to be prepared 'having regard to social, spiritual and cultural matters relevant to Indigenous people in relation to the water resources of the water resource plan area...'²¹;
- amending the functions of the MDBA to require them 'to engage the Indigenous community on the use and management of Basin water resources'²²;
- expanding the list of expertise of members of the MDBA to include 'Indigenous matters relevant to Basin water resource'²³; and

²⁰

http://www.edonsw.org.au/water_amendment_review_implementation_and_other_measures_bill_2015

²¹ Proposed s. 22(3)(ca).

²² Proposed s. 172(1)(a)(i).

²³ Proposed s. 178(3)(h).

- requiring the Basin Community Committee to include 'at least 2 Indigenous persons.'²⁴

EDO NSW is strongly supportive of these amendments, however submits that further amendments to the Act are required to properly provide for indigenous knowledge, participation in water management in the Basin and cultural water.

Recommendation

- EDO NSW strongly supports further amendments to the Water Act which properly provide for indigenous knowledge, participation in water management in the Basin and cultural water/watering events. This should include:
 - an appropriately worded object to the Act;
 - a requirement that water resource plans set aside a certain percentage of water for cultural use;
 - a requirement that the Water Act and Basin Plan give effect to the United Nations Declaration on the Rights of Indigenous Peoples.
- These provisions should be developed in consultation with the appropriate Aboriginal stakeholder groups.

²⁴ Proposed s. 202(5)(c).